No. 03-725

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IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO, CARL J. PASQUANTINO & ARTHUR HILTS,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the federal wire fraud statute (18 U.S.C. § 1343) authorizes criminal prosecution of an alleged fraudulent scheme to avoid payment of taxes potentially owed to a foreign sovereign, given the lack of any clear statement by Congress to override the common law revenue rule, the interests of both the Legislative and Executive Branches in guiding foreign affairs, and this Court's prior rulings concerning the limited scope of the term "property" as used in the wire fraud statute.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the en banc court of appeals affirming Petitioners' convictions (Pet. App. 1a-37a) is reported at 336 F.3d 321 (4th Cir. 2003).[1] The panel opinion reversing the convictions (Pet. App. 38a-53a) is reported at 305 F.3d 291 (4th Cir. 2002). The district court's opinion denying a motion to dismiss the indictment (J.A. 60-62) is unreported.

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[1] The Appendix filed in connection with the Petition for Certiorari is cited herein as Pet. App. ___. The Joint Appendix filed in connection with merits briefing is cited herein as J.A. ___.

JURISDICTION

The court of appeals entered judgment on July 18, 2001. On April 5, 2004, this Court granted a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18 United States Code Section 1343, which states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On April 13, 2000, a federal grand jury in the Northern District of Maryland returned an indictment charging David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts (collectively, "Petitioners"), along with four other individuals, on six counts of wire fraud and aiding and abetting wire fraud, in violation of 18 U.S.C. §§ 2 and 1343. The indictment alleged that Petitioners had engaged in a scheme "to defraud the government of Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor." Pet. App. 57a-64a.

Petitioners moved to dismiss the indictment on the ground that the United States did not have a justiciable interest in their putative smuggling scheme against Canada, a foreign sovereign. On September 7, 2000, the district court denied the motion, and the case was tried to verdict.

At trial, the government submitted evidence that Petitioners had purchased alcohol in bulk quantities from various re-

tailers in the United States, paying all applicable state and federal taxes. Pet. App. 40a. The government then submitted evidence that some of the bottles of alcohol purchased by Petitioners had been transported across the border into Canada, and that on a few occasions Petitioners or persons allegedly associated with them had attempted to avoid inspection of the vehicles they were driving and in which they were transporting alcohol. Pet. App. 3a. The government did not present any evidence showing that Petitioners ever made any misrepresentation to any representative of the Canadian government.

The government did not provide notice pursuant to Federal Rule of Criminal Procedure 26.1 that it intended to submit proof regarding the laws of Canada or Ontario, and it did not do so. J.A. 17-46. The only evidence regarding the alleged failure to pay Canadian taxes came from a Canadian Customs Officer, Officer Jonah, who testified that alcohol "is taxed very high" in Canada, and that, according to her calculation, the various Canadian excise and sales taxes associated with the alcohol purchased by Petitioners would have totaled approximately $100 (U.S.) per case imported into Canada. J.A. 65-66. She did not explain how she arrived at this number.

Officer Jonah provided no evidence that Canada or Ontario had any pre-existing property interest in the tax revenues she had calculated, or even that the tax laws on which she based her calculation had been in effect at the time of the alleged offense. Nor did she testify as to the procedure through which the taxes she mentioned are assessed or the point at which they become due and owing under Canadian law. She provided no evidence showing that Canada's and Ontario's interests in collecting any applicable taxes were transferable or proprietary, rather than sovereign and inherently governmental, or that any Canadian court or agency had made any determination regarding the amount of taxes that Petitioners allegedly owed or planned to evade. J.A. 64-83.

The jury returned its verdict on February 13, 2001, and the district court imposed sentence on June 8, 2001. The district court sentenced Messrs. Carl and David Pasquantino to fifty-seven months' imprisonment each, and Mr. Hilts to twenty-one months. J.A. 113, 125, 136. These sentences included an enhancement based on the government's estimate of "intended loss" to Canada and Ontario pursuant to U.S.S.G. § 2F1.1 (2000). Pet. App. 24a-26a. The government calculated this loss by taking Officer Jonah's calculation as to the amount of tax imposed per case of imported alcohol under Canadian law, and multiplying it by the number of cases "involved in the scheme." J.A. 104-05. To arrive at this latter number, the government relied on testimony from various liquor retailers that approximately 90% of their documented inventory during the relevant period had been sold to Petitioners, and assumed that all of this amount was intended for importation into Canada. J.A. 92-93, 97, 104-105.[2] *Id.* Despite having advocated an enhancement based on the intended loss to Canada, the government took the position that restitution was "not appropriate in this case since the victim is a foreign government and the loss derives from tax laws of the foreign government." J.A. 106. The district court agreed and did not require restitution. J.A. 120, 132, 143.

On September 30, 2002, a panel of the United States Court of Appeals for the Fourth Circuit reversed the convictions. The majority asserted that the "determination of whether Canada was actually or would have been *entitled to the tax revenues* involves an inquiry into the validity and operation of a foreign revenue law." Pet. App. 44a (emphasis in original). The court concluded that "principles underlying the revenue rule"—which the panel described as a "long-standing common law doctrine providing that courts of one sovereign

[2] The jury was not asked to find the precise number of cases "involved in the scheme," and no specific number is reflected in the jury's verdict finding Petitioners guilty of a "scheme to defraud." J.A. 85-91.

will not enforce final tax judgments or unadjudicated tax claims of other sovereigns"—bar inquiry into Canada's entitlement to tax revenue and "therefore bar appellants' prosecution in this case." Pet. App. 44a-46a. The Fourth Circuit went on to state that the decision of the First Circuit in *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), a case holding that the revenue rule barred a wire fraud prosecution based on failure to pay foreign taxes, was better reasoned than the "flawed" decision of the Second Circuit in *United States v. Trapilo*, 130 F.3d 457 (2d Cir. 1997), which reached the opposite conclusion. Pet. App. 46a-50a. The court also rejected the notion that the revenue rule should be applied differently in civil and criminal cases. Pet. App. 49a, n.23.

The Fourth Circuit reheard the case en banc, and on July 18, 2003, affirmed the decision of the district court and reinstated Petitioners' convictions, holding the revenue rule inapplicable. Pet. App. 15a. Judge Gregory and Judge Michael dissented, arguing that the revenue rule barred Petitioners' conviction. Pet. App. 27a-37a.

INTRODUCTION TO ARGUMENT

The only harm alleged in this case is loss of Canadian tax revenue. The statutes, treaties, and common law of this country, however, all provide that U.S. courts should not be used to remedy this harm. The federal statute that prohibits smuggling into other countries, for example, applies *only* if that other country has a reciprocal provision. Canada does not. *See infra* at 45-46. The relevant treaty between the United States and Canada provides that the United States will not assist Canada in collecting taxes absent a final determination of the amount owed in Canada, and will not provide such assistance in any event against U.S. citizens. *See infra* at 47-49. Petitioners are U.S. citizens, and no Canadian authority has issued such a determination against them. Finally, the long established common law revenue rule, which is a foundational premise underlying the negotiation of international

tax agreements, provides that the courts of one nation do not, absent a treaty authorizing such comity, directly or indirectly enforce the penal or revenue laws of other sovereigns. *See infra* at 9-27.

Despite all of this, rather than extradite Petitioners to stand trial in Canada, the U.S. government has invoked the wire fraud statute to prosecute them in the United States for their alleged fraudulent evasion of Canadian revenue law. The wire fraud statute, however makes no mention of taxes or enforcement of foreign law, and the statute is limited in scope by the background common-law rules, understandings, and practices against which it was enacted. This Court has repeatedly invoked these traditional understandings to prevent unjustified prosecutorial efforts to unilaterally expand this Act of Congress to situations unsanctioned by its express terms. This case calls upon the Court to do so again.

The expansion of federal criminal law effected by Petitioners' convictions—along with the radical revision of international relations that those convictions represent—has implications going far beyond the realm of petty smuggling operations. It will affect both U.S. courts and U.S. businesses in ways that Congress has neither considered nor sanctioned. If the wire fraud statute encompasses schemes to evade foreign revenue laws, then such prosecutions will require our federal courts to determine, not only the content of those laws, but the amounts of revenue that defendants would have owed under them had they complied. In other words, our courts will have to address precisely the kinds of questions that the revenue rule guards against and that are usually entrusted to elaborate administrative bureaucracies that were created—in both the United States and many other countries—to answer them in the first instance. If affirmed, the Fourth Circuit's ruling will have the "truly horrific" result of embroiling federal courts in the substantive and procedural niceties of foreign tax laws about which they have "no

expertise." Stuart E. Abrams, *Foreign-Tax Evasion as Mail and Wire Fraud*, Business Crimes Bulletin (Feb. 2004).

Moreover, as illustrated by the continued interest that the National Association of Manufacturers has expressed in this issue,[3] the government's expansive reading of the wire fraud statute also has chilling implications for U.S. businesses that participate in international commerce. Such businesses must engage in international tax planning, often in a context where foreign revenue law—much like that of the United States—may be uncertain. This case raises the ominous possibility that alleged failures to comply with foreign revenue law may serve as bases, not only for prosecution under the wire fraud statute, but for liability under the federal racketeering and money laundering statues that use wire fraud as a predicate offense. The operation of these laws may well lead to domestic penalties far more onerous than those imposed by the foreign nations whose revenue laws are invoked. It will also lead—indeed, has already led—to repeated attempts by foreign governments to recover their uncollected tax revenues in the courts of the United States. Had Congress chosen to make the courts of this country into "the world's tax courts," it would not have left this expansion of jurisdiction to be inferred from the general language of a provision that is silent on the matter.[4] It would have said so expressly. As

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[3] *See* Brief Of The National Association Of Criminal Defense Lawyers And The National Association Of Manufacturers As Amici Curiae In Support Of Petitioners (filed concurrently herewith); Brief of the National Association of Manufacturers and United States Chamber of Commerce as Amici Curiae, *RJR*, 268 F.3d 103 (2d Cir. 2001) (No. 00-7972) (Theodore B. Olson, Counsel of Record) ("*RJR* Amicus Brief").

[4] *See RJR* Amicus Brief at 22 (arguing that RICO claims based on the theory of wire fraud at issue in this case would "create interpretive problems and drain precious judicial resources by transforming U.S. federal courts into the world's tax courts; it would also saddle U.S. multinational companies with potentially paralyzing risks of liability."); *See also* Kathryn Keneally, *The U.S. Prosecutes Foreign Tax Evasion as a Domestic Crime—With Far-Reaching Consequences*, 88 J. Tax'n 224,

demonstrated below, Congress has not done so, and the Fourth Circuit's decision upholding Petitioners' convictions must be reversed.

SUMMARY OF ARGUMENT

1. The common law revenue rule, which dates back over 200 years, provides that the courts of one country will not enforce the revenue or penal laws of another. Criminal prosecutions for "schemes to defraud" a foreign sovereign of tax revenue fall within the realm of actions traditionally barred by the revenue rule.

2. Neither the statutory text nor the legislative history of the federal enactments concerning the offenses of mail fraud or wire fraud, 18 U.S.C. §§ 1341, 1343, supports the notion that Congress abrogated the revenue rule by enacting these statutes. In the absence of any clear statement by Congress to the contrary, the interpretation of the wire fraud statute must be informed and limited by the revenue rule.

3. The wire fraud statute, 18 U.S.C. § 1343, applies to any "scheme or artifice to defraud . . . ." This Court has held that this language incorporates and is limited by the common law of fraud, except to the extent that Congress may have clearly expressed a desire to modify that law. *See Neder v. United States*, 527 U.S. 1, 21-25 (1999). As a result of the revenue rule, no fraud action existed at common law for failure to pay taxes to a foreign sovereign. Nor, in the absence of foreign customs law, which U.S. courts do not enforce, would the mere failure to disclose one's importation of goods constitute an actionable misrepresentation. Yet the convictions in this case were based on just such omissions.

228-29 (1998) (warning that this use of the mail and wire fraud statutes "will not only improperly enmesh U.S. courts in interpreting and applying those foreign tax laws . . . but also risks turning federal prosecutors into de facto criminal law enforcement agents for foreign tax authorities.").

4. The wire fraud statute is also limited to schemes aimed at obtaining "money or property" held by a victim. *Cleveland v. United States*, 531 U.S. 12 (2000). As this Court demonstrated in *Cleveland*, in order to determine whether a governmental interest qualifies as "property" under the statute, a court must carefully examine the operation of and purposes served by the laws creating this interest. *See id.* at 20-27. Uncollected taxes in general—and unadjudicated tax claims of foreign sovereigns in particular—will rarely qualify as "property." Such claims represent assertions of sovereign power, not claims predicated on the sovereign's ownership of property. Moreover, the government waived the opportunity to submit proof of foreign law, and any attempt to submit proof regarding the nature of Canada's interest in enforcing its unadjudicated tax claims would have made clear the applicability of the revenue rule by calling for the very engagement with foreign revenue law that courts have sought to avoid.

5. While the wire fraud statute contains no clear statement authorizing prosecution for failure to pay foreign taxes, the Legislative Branch, through treaties and statutes, has repeatedly recognized the existence of the revenue rule and deviated from it only upon obtaining reciprocity from a foreign government. Such reciprocity is absent in this case, and the Executive cannot unilaterally modify the terms of the wire fraud statute against the will of Congress.

ARGUMENT

I. SECTION 1343 MUST BE CONSTRUED IN LIGHT OF THE COMMON LAW RULE AGAINST ENFORCEMENT OF THE PENAL OR REVENUE LAWS OF FOREIGN SOVEREIGNS.

Congress enacted the federal wire fraud statute against the backdrop of a common law tradition recognized for hundreds of years by both this and other nations, according to which

the courts of one state do not, absent an authorizing treaty, enforce the penal or revenue laws of foreign sovereigns.[5]

[5] In the United States, *see, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964) (noting principle that "a court need not give effect to the penal or revenue laws of foreign countries"); *Oklahoma ex. rel. West v. Gulf, Colo. & Santa Fe Ry. Co.*, 220 U.S. 290, 299 (1911) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state . . . for any violation of statutes for the protection of its revenue[.]") (citation omitted); *The Antelope*, 23 U.S. 66, 123 (U.S. 1825) ("The courts of no country execute the penal laws of another.") (Marshall, C.J.); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109-26 (2d Cir. 2001) ("*RJR*") (reviewing history of and justifications for revenue rule and holding that rule bars civil RICO suit by foreign country to collect tax revenue) *cert. denied*, 537 U.S. 1000 (2002); *Aetna Ins. Co. v. Robertson*, 90 So. 120, 126 (Miss. 1921) ("[I]t is a familiar principle of law that one state or country will not aid another state or country in giving effect to judgments enforcing its penal laws, or in collecting its revenues."); *Henry v. Sargeant*, 13 N.H. 321, 332 (N.H. 1843) ("[T]he court will not notice the penal laws, or the revenue laws, of another state."); *Ludlow v. Van Renesslaer*, 1 Johnson 93, 95-96 (N.Y. Sup. Ct. 1806) ("[W]e do not sit here to enforce the revenue laws of other countries.").

In Canada, *see, e.g., United States v. Harden*, [1963] S.C.R. 366, 371 (Can.) (refusing to enforce stipulated judgment of debt entered in U.S. district court, where underlying debt had consisted of tax liability); *Stringam v. Dubois*, 135 A.R. 64 (Alta Ct. App. 1992) (rejecting suit to liquidate Canadian estate assets in satisfaction of U.S. estate taxes).

In other common-law countries, *see, e.g., Government of India v. Taylor*, 1955 A.C. 491, 508 (Eng. H.L.) (appeal taken from C.A.) ("We proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries[.]"); *Peter Buchanan Ltd. v. McVey*, 1955 A.C. 516, 524 (Ir. H. Ct. 1950) (hereinafter "*Peter Buchanan*") ("The Court has no jurisdiction at common law to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State.") (citation omitted), *aff'd* 1955 A.C. 530 (Ir. Sup. Ct. 1951); *Queen of Holland v. Drukker*, [1928] 1 Ch. 877, 881-82 (Eng.) ("It seems to be plain that at any rate for somewhere about 200 years . . . the judges have . . . repeatedly said that the Courts of this country do not take notice of the revenue laws of foreign States."); *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (K.B. 1779) ("One nation does not take notice of the revenue laws of another.") (Lord Mansfield).

This principle is not only firmly embedded in judicial precedent, but is also reflected or embodied in numerous enactments of Congress, the States, and foreign nations. *See infra* at 45-50. It would be a striking and unprecedented departure from over 200 years of Western legal tradition for a sovereign—without seeking or receiving reciprocity from any of the other nations of the world—to pass a law indiscriminately rendering the customs and revenue laws of *all* those nations a basis for imposing criminal liability on its own citizens. Yet such is the Fourth Circuit's view of the wire fraud statute in this case.

A. The Reasons For The Rule Against Enforcing Foreign Penal And Revenue Laws.

As with most longstanding common law doctrines, courts invoking the revenue rule over the centuries have articulated various rationales for its existence. All of them, however, rest ultimately on an understanding that while courts will sometimes take notice of foreign laws in adjudicating the private rights of individuals within their jurisdiction, it is a fundamentally different matter for them to act as instruments for the enforcement of foreign penal and revenue laws. Such laws embody not general principles regulating private interaction, but the political will of a particular sovereign, and they enforce obligations imposed by sovereign fiat, often for purely political ends.[6] This is particularly true of revenue

[6] *See RJR*, 268 F.3d at 111 ("Tax laws embody a sovereign's political will."); *Boots*, 80 F.3d at 587 ("[R]evenue laws are positive rather than moral law[.]"); *Taylor*, 1955 A.C. at 511 ("[A] claim for taxes is but an extension of the sovereign power which imposed the taxes, and . . . an assertion of sovereign authority by one State within the territory of another . . . is (treaty or convention apart) contrary to all concepts of independent sovereignties.") (Lord Keith); *Peter Buchanan*, 1955 A.C. at 529 ("[T]he nature and incidence of governmental and revenue claims are

laws, whose most basic object is appropriation of the resources a state regards as necessary to maintain its existence and pursue its interests.[7]

Moreover, revenue laws, like penal laws, are frequently used to further various other state policies particular to the sovereign enacting them. These include maintenance of an ideologically desirable distribution of wealth, enforcement of political and moral judgments about certain persons, activities or products, and advancement of the state's perceived industrial and commercial interests.[8] The revenue rule reflects a widespread recognition that one sovereign has no

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not dictated by any moral principles, but are the offspring of political considerations and political necessity."); *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775) (Lord Mansfield) (enforcing a contract on behalf of a foreign plaintiff who knew the defendant intended to violate English customs law) ("An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all positivi juris.").

[7] *See, e.g., Moore v. Mitchell*, 30 F.2d 600, 602 (2d Cir. 1929) ("Taxes are imposts, not debts, collected for the support of the government. The form of procedure to collect them cannot change their character. . . . The enforcement of revenue laws rests, not on consent, but on force and authority.") (citations omitted), *aff'd* 281 U.S. 18 (1930); *Colorado v. Harbeck*, 232 N.Y. 71, 85 (N.Y. Ct. App. 1921) ("[T]axes are not debts or contracts. . . . Liability to pay is a consequence imposed by fiat."); *Taylor*, 1955 A.C. at 514 ("Tax gathering is not a matter of contract but of authority and administration[.]") (Lord Somervell).

[8] *See Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1258 (11th Cir. 2003) ("[T]ax laws are regarded as embodying a nation's social and political policy choices."), *cert. denied*, 124 S. Ct. 1075 (2004); *RJR*, 268 F.3d at 111 ("Sales taxes, for example, may enforce political and moral judgments about certain products. Import and export taxes may reflect a country's ideological leanings and the political goals of its commercial relationships with other nations."); *Municipal Council of Sydney v. Bull*, [1909] 1 K.B 7, 12 (Eng.) ("Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes.").

general interest in assisting another to implement these types of policies, especially when they do not reflect compatible values and interests. As the Second Circuit has remarked:

> How would we respond if a foreign sovereign asked us to help enforce a tax designed to render it very expensive to sell United States newspapers in that nation? Or to make the inclusion of United States-made content in machinery built in that foreign country prohibitively expensive? Suppose it were a tax that had been raised to deter the sale of United States pharmaceuticals in that country? Or if a foreign nation imposed an immigration tax on members of a particular religious group or racial minority?

RJR, 268 F.3d at 113.[9]

Even when two nations share similar policy goals, one will not generally enforce the other's penal or revenue laws without some assurance of receiving reciprocal treatment.[10] Given the differing interests and values pursued by various nations, the extent to which such reciprocity can and should be forthcoming is a matter properly decided by those to whom the Constitution commits the powers to make treaties and to regulate foreign commerce.[11]

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[9] *See also Sabbatino*, 376 U.S. at 448 (White, J., dissenting on other grounds) ("Our courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign"); *Peter Buchanan*, 1955 A.C at 529 ("Such laws have been used for religious and racial discrimination; for the furtherance of social policies and ideals dangerous to the security of adjacent countries; and for the direct furtherance of economic warfare.").

[10] *See, e.g., RJR*, 268 F.3d at 121 (discussing importance of reciprocity in U.S.-Canada tax treaty); *infra* at 47-49.

[11] *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289-90 (1888) ("the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offences committed abroad by its own citizens").

In addition, as Judge Learned Hand observed, for courts to accept adjudication of claims based on foreign revenue laws would routinely put them in the position of passing on the validity and construction of those laws and determining whether the policy judgments they embody were sufficiently compatible with those of our own political system to be enforced.[12] This would both burden our courts with the onerous task of parsing foreign revenue codes,[13] and place them in the position of giving offense to certain sovereigns by singling out their laws as unenforceable.[14]

B. The Scope Of The Rule Against Enforcing Foreign Penal Or Revenue Laws.

In *Huntington v. Attrill*, 146 U.S. 657 (1892), this Court addressed the scope of the "fundamental maxim of international law" that Chief Justice Marshall had stated in the fewest possible words: "The courts of no country execute

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[12] *See Moore*, 30 F.2d at 604 ("[A] court will not recognize those [liabilities] arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state.") (L. Hand, J., concurring).

[13] *See, e.g., Detroit v. Proctor*, 61 A.2d 412, 415 (Del. Sup. Ct. 1948) ("[T]he court may well feel very reluctant to assume the burden of administering an intricate tax system with which it is totally unacquainted[.]"); *Sargeant*, 13 N.H. at 338 (state court commenting on its own "embarrassment" in attempting to interpret the revenue laws of another state); *Taylor*, 1955 A.C. at 514 (noting that it would be "remarkable comity" for the courts of one state to assist another in the "intricate and prolonged" process of applying its tax laws); Abrams, *supra* at 7.

[14] *See Moore*, 30 F.2d at 604 (L. Hand, J.) (reasoning that courts should not put themselves in the position of having to rule whether the revenue and criminal laws of a foreign sovereign are proper); *Peter Buchanan*, 1955 A.C. at 529 (agreeing with Judge Hand that courts should not attempt to discriminate between the revenue laws of different states) ("Safety lies only in universal rejection.").

the penal laws of another." *Id.* at 666 (quoting *The Antelope*, 23 U.S. 66, 123 (1825)). As Justice Gray elaborated:

> Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state; and the authorities, legislative, executive, or judicial, of other states take no action with regard to them, except by way of extradition[.]

146 U.S. at 669. This Court has never had occasion to define the scope of this principle as it applies specifically to revenue laws, and courts in this and other countries have articulated the "revenue rule" in formulations of varying breadth and force over the centuries. Although some courts have voiced a categorical refusal to take any notice of a foreign nation's revenue laws whatsoever,[15] a more precise statement of the rule's scope as understood and applied both today and at the time the wire fraud statute was enacted is somewhat narrower: "[I]n no circumstances will the courts *directly or indirectly enforce* the revenue laws of another country." *Taylor*, 1955 A.C. at 510 (Lord Keith) (emphasis added).[16]

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[15] *See, e.g., Harbeck*, 232 N.Y. at 85 ("The rule is universally recognized that the revenue laws of one state have no force in another."); *James v. Catherwood*, [1824] 3 K.B. 190, 191 (Eng.) ("[I]n a British Court we cannot take notice of the revenue laws of a foreign state."); *Planche*, 99 Eng. Rep. at 165 (Lord Mansfield) ("One nation does not take notice of the revenue laws of another.").

[16] Lord Keith was summarizing and adopting the reasoning of the Irish High Court in *Peter Buchanan*:

> Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaint that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly

1. *Courts refuse requests for direct enforcement of foreign penal and revenue laws.*

The most straightforward application of the revenue rule arises when a foreign sovereign attempts to sue directly in its own right to enforce a tax judgment in the courts of another nation. Such attempts so patently violate the rule that they have been rare in the international setting.[17] For centuries, there has been an established practice that a foreign sovereign cannot sue in another country to enforce its "prerogative" or sovereign rights, such as the right to collect taxes.[18]

Within the United States, similar attempts by States to enforce their fiscal laws in the courts of other states were long rebuffed. In *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888), the state of Wisconsin sought to bring an action in this Court to enforce a judgment against a Louisiana corporation for penalties it had incurred under a Wisconsin regulatory statute. This Court held that its original jurisdiction extended only to cases that could have been brought in the courts of the defendant's state, *see id.* at 289, and that

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involve the execution of the revenue law of another State, and serve a revenue demand.

Peter Buchanan, 1955 A.C. at 527.

[17] *See, e.g., Her Majesty the Queen v. Gilbertson*, 597 F.2d 1161, 1164 n.7 (9th Cir. 1979) ("The issue is one of first impression. Apparently this is the first time in American legal history that a foreign government has sought enforcement of a tax judgment in a court of the United States.") (citation omitted).

[18] *See generally* F.A. Mann, *Prerogative Rights of Foreign States and the Conflict of Laws*, 40 Transactions of the Gro[illegible]s Society 25, 34-35 (1955) ("[Ã] foreign State cannot enforce in England such rights as are founded upon its peculiar powers of prerogative. Claims for the payment of penalties, for the recovery of customs duties or the satisfaction of tax liabilities are, of course, the most firmly established examples of this principle."); *see also* 1 Daniell's Chancery Practice at 71 (London 6th ed. 1882) ("[T]he infringement of [a foreign sovereign's] prerogative rights does not constitute a ground of suit.").

the Court lacked jurisdiction over the case in question, because "[b]y the law of England and of the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or statute[.]" *Id.* at 289-90. In keeping with *Pelican Ins. Co.*, courts in a number of other cases refused to enforce tax claims brought by other states.[19] In *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), this Court partially overruled *Pelican Ins. Co.* by holding that the Full Faith and Credit Clause required states to enforce judgments from other states, including judgments of tax liability. *See id.* at 276-77. The holding of *M.E. White Co.* has no application to relations between the United States and foreign sovereigns, in which sphere there is no Full Faith and Credit Clause, and in which the principles laid out in *Pelican Ins. Co.* retain their full force. *See Sun Oil v. Wortman*, 486 U.S. 717, 742 n.3 (1988) (Brennan, J., concurring). *See also infra n.* 53.

2. *Courts refuse requests for indirect enforcement of foreign penal and revenue laws.*

In the international context, the revenue rule has been understood to do far more than prevent foreign sovereigns from suing in their own right to collect on tax judgments.

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[19] *See, e.g., Moore*, 30 F.2d at 602 (action brought in New York by Indiana county treasurer to recover taxes allegedly due from estate of former Indiana resident was "repugnant to the settled principles of private international law, which preclude one state from acting as a collector of taxes for a sister state, and from enforcing its penal or revenue laws as such"); *Harbeck*, 133 N.E. at 360 (refusing attempt by Colorado to recover inheritance tax assessed upon the estate of former Colorado resident who had died in New York) ("The rule is universally recognized that the revenue laws of one state have no force in another."); *Arkansas v. Bowen*, 20 D.C. 291, 295 (D.C. Sup. Ct. 1891) ("It has been very well settled that one State will not take cognizance of or enforce the judgment of another State where such judgment is founded upon penal laws, or laws relating exclusively to the collection of the revenues of the State wherein it is rendered."), *aff'd*, 3 App. D.C. (1 Mackey) 537 (1894).

Courts of one sovereign have generally refused to adjudicate claims or defenses to claims where adjudication would have even the *indirect effect* of giving force to the prerogative rights of another, even where "the claimant is a person other than the foreign State and . . . the claim sounds in contract or in tort." Mann, *supra* n. 18 at 35.

The earliest cases illustrating this principle are those addressing the enforceability of contracts predicated upon violation of revenue laws. In *Holman v. Johnson*, the earliest English case to state the proposition that "no country ever takes notice of the revenue laws of another," the court had been asked to enforce payment on a contract for the sale, completed in France, of goods that the vendor knew would then be smuggled into England in violation of English customs law. *See* 98 Eng. Rep. 1120, 1121 (K.B. 1775). Lord Mansfield held that while a contract *requiring* violation of English revenue law—as this one did not—would be unenforceable in English courts, a contract through which a foreign plaintiff knowingly profits from the defendant's *intended* violation of that same law does not render the contract unenforceable for immorality. *See id.* at 1121. This is because "the revenue laws themselves, as well as the offences against them, are all positivi juris." *Id.* In other words, a corollary of the principle that "no country ever takes notice of the revenue laws of another" is that no citizen of one country is morally bound by the revenue laws of another. Lord Mansfield was willing to enforce contracts on behalf of foreign vendors who sold knowing their goods were destined for smuggling into England. *See* 98 Eng. Rep. at 1121 ("The seller, indeed, knows what the buyer is going to do with the goods."). One can only imagine his stupefaction at the spectacle of a sovereign subjecting its *own* citizens to criminal prosecution for "scheming to defraud" a *foreign* country of tax revenue. In cases both before and after *Holman*, Lord Mansfield and other judges have refused to give effect to foreign revenue laws that would, if recognized by the court

as binding, invalidate the contract the court was being asked to enforce.[20]

Another line of cases involves claims brought by foreign sovereigns on grounds ostensibly distinct from tax liability, but that courts nevertheless have recognized as attempts to give indirect effect to foreign revenue law. In these cases, courts concern themselves "not with form but with substance," and have held that claims arising from foreign revenue law will not be enforced under another name. *Harden*, [1963] S.C.R. at 371 (Can.) (refusing to enforce stipulated judgment of debt entered in U.S. district court, where underlying debt had consisted of tax liability); *see also Attorney General of Canada v. Schulze*, [1901] 9 Scots Law Times 4, 4-5 (refusing to enforce judgment for court costs, where costs were incurred by foreign state in defending the legality of its forfeiture of defendants' goods as penalty for infraction of revenue laws).

Even where the suit is not brought by a foreign sovereign, but by a private party seeking to enforce an ostensibly private right of action, courts have refused to enforce claims where the result would be vindication of a foreign sovereign's rights

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[20] *See, e.g., Ludlow*, 1 Johns. at 95-96 (absence of French revenue stamp on contract made in France was no obstacle to its being introduced in evidence in New York court); *Catherwood*, [1824] 3 K.B. at 191 (same holding by English court); *Planche*, 99 Eng. Rep. at 165 (Lord Mansfield) (enforcing insurance policy despite insured's falsification of bills of lading in order to evade French customs law); *Boucher v. Lawson*, 95 Eng. Rep. 53, 56 (K.B. 1734) (Lord Hardwicke) (contract to ship gold to London enforceable even though exportation of gold had been unlawful under Portuguese law). *Cf. Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K.B. 539, 550 (Eng.) (private debtor could not deduct U.S. income tax from its interest payments on loan) ("[I]t is no part of [the duty of an English Court] to enforce the Taxing Act of another country.").

under its own revenue laws.[21] Such suits have often involved bankruptcy trustees or executors seeking to enforce the right of an estate to recover assets situated in foreign countries. In *Peter Buchanan* for example, a Scottish company and its appointed liquidator sued in Ireland to recover company funds allegedly distributed by a director acting ultra vires. *See* 1955 A.C. at 516-21. Because recovery would serve to satisfy the company's tax obligations, however, the court held that it could not enforce the company's claim without indirectly enforcing Scottish revenue law. This it would not do. *See id.* at 523-30. In this and other cases, courts have refused to enforce claims that, though not directly based on revenue law, would nevertheless give effect to a foreign sovereign's revenue claim.[22]

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[21] In contrast, some private party suits have been allowed to proceed where a court was required to interpret a foreign tax law, but not to enforce its norms either directly or indirectly. *See, e.g., Sargeant*, 13 N.H. at 332 (New Hampshire court could determine whether tort defendants had acted under color of Vermont law, because "[t]he plaintiff seeks to enforce no right or claim arising under any revenue, police, or other statute of Vermont," and hence there was "no attempt to enforce the penal or revenue laws of Vermont by this action.").

[22] *See, e.g., In re Guyana Dev. Corp.*, 201 B.R. 462, 474 n.4 (S.D. Tex. 1996) (noting difficulty experienced by U.S. bankruptcy trustee overseas because foreign courts "were not interested in assisting or cooperating with [him] when they perceived him to be a collection surrogate for the IRS for payment of U.S. taxes"); *QRS 1 Aps v. Frandsen* [1999] 3 All E.R. 289, 293-94 (Eng. C.A. 1999) (rejecting suit by Danish liquidator to recover corporate funds needed to pay taxes); *id.* at 295 (discussing French case in which court refused to allow private plaintiff, whose shares had been seized and sold by the German government to discharge a tax liability, to recoup from defendant his share of the original debt); *Stringam*, 135 A.R. at 68 (rejecting suit by U.S. executor to liquidate Canadian estate assets in satisfaction of U.S. estate taxes for which U.S. probate assets were insufficient) ("An indirect attempt at enforcement is as offensive as a direct attempt and . . . one must look at the substance of the claim to determine its nature for the purposes of application of the rule.").

3. *A fraud claim based on evasion of foreign taxes falls within the revenue rule.*

Petitioners were charged with scheming to defraud the governments of Canada and Ontario of tax revenue. Pet. App. 58a. This "scheme to defraud" consisted, not of making a misrepresentation to these states that induced them to part with tax proceeds already in their possession, but of allegedly failing (a) to declare the importation of taxable goods, (b) to allow an assessment of associated taxes, and (c) to remit whatever payment would be due at the appropriate time.[23] Had either of those two governments attempted to recover these unassessed, unpaid taxes through a simple fraud claim outside of Canada, the attempt would have been rebuffed as a transparent attempt to enforce a foreign country's tax laws.[24]

In fact, this is precisely what happened when the government of Canada sought to bring a civil RICO suit predicated on a "scheme to defraud" similar to that alleged in this case. In *RJR*, the defendants had conspired to import cigarettes into

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[23] *See Pelican Ins. Co.*, 127 U.S. at 291 (distinguishing between "the recognition of a vested title in property" and a claim in which "further judicial action is sought to compel the payment by the defendant to the plaintiff of money in which the plaintiff has not as yet acquired any specific right"); *RJR*, 268 F.3d at 130 ("Canada is not asking for the enforcement of a final, fully adjudicated Canadian tax judgment, but rather, for a United States court to assess and adjudicate the application of Canadian tax laws to the wrongdoing alleged in its complaint.").

[24] *See, e.g., Banco Do Brasil, S.A. v. A.C. Israel Commodity Co.*, 190 N.E.2d 235, 237 (N.Y. Ct. App. 1963) (rejecting suit by instrumentality of Brazil to recover for an alleged conspiracy to defraud it of American dollars by illegally circumventing its foreign exchange regulations) ("[I]t is well established since the day of Lord Mansfield that one State does not enforce the revenue laws of another."); *Peter Buchanan*, 1955 A.C. at 523 (suit seeking recovery of company funds distributed in allegedly "fraudulent and void" transaction), *id.* at 527 ("[I]t is not the form of the action or the nature of the plaintiff that must be considered, but the substance of the right sought to be enforced.").

Canada without paying the taxes imposed by Canadian law. *See* 268 F.3d at 105-06. The Attorney General of Canada brought a suit to recover as damages from this "racketeering activity" both the unpaid revenues and the monies it had spent to catch the smugglers. *Id.* In an exhaustively researched opinion, the Second Circuit examined the history and policy behind the revenue rule, as well as the history of U.S. participation in international tax-treaties. *See id.* at 109-22. The court concluded that "sound policy considerations, including international comity, the proper exercise of sovereign powers, institutional competence and separation of powers, and recognition of the U.S.-Canada tax treaty relationship, support the continuing viability and application of the revenue rule[.]" *Id.* at 124-126.

In determining whether Canada's civil RICO suit fell within the scope of the rule, the Second Circuit reasoned that "a court must examine whether the substance of the claim is, either directly or indirectly, one for tax revenues. What matters is not the form of the action, but the substance of the claim." *Id.* at 130. Because the substance of Canada's claim was "to enforce, both directly and indirectly, its tax laws," and nothing in the RICO statute expressly authorized such an application, the Second Circuit held that the claim was barred by the revenue rule. *See id.* at 130-34. The Second Circuit emphasized that both the United States and Canada "have expressed a policy preference for reciprocity in the level of enforcement of each other's tax judgments and claims." *Id.* at 121. *See infra* at 46-49.

The Eleventh Circuit reached the same result in *Philip Morris Cos.*, 341 F.3d at 1258 (rejecting civil RICO suit brought to enforce foreign sovereign's tobacco taxes). These holdings, along with that of the First Circuit in *Boots*, 80 F.3d 580 (rejecting criminal application of federal wire fraud statute to scheme to evade Canadian excise taxes), demonstrate that absent a clear statement from Congress abrogating the revenue rule, the rule applies to actions arising under U.S.

federal fraud-related statutes, as well as claims in U.S. courts seeking to impose liability under tax laws directly.

C. Criminal Prosecution Of A Scheme To Evade Foreign Taxes Falls Within The Revenue Rule.

The theory underlying the government's prosecution in this case is that the revenue rule is not implicated by a criminal prosecution to enforce the federal wire fraud statute, because such a prosecution "does not seek to collect tax revenue for the foreign government." Br. in Opp. at 7. As the foregoing discussion has established however—and as the government itself has acknowledged in the past—the revenue rule is not limited to direct attempts to collect tax revenue for foreign nations, but rather applies to "claims that, *in substance, seek to enforce foreign revenue laws*." Brief for the United States as Amicus Curiae at 7, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.* (S.Ct. Case No. 01-1317) (Oct. 2002) (opposing certiorari) (emphasis added).[25] The question then, is whether criminal prosecution of schemes to evade foreign taxes seek in substance to enforce foreign revenue laws.

As far as Petitioners are able to ascertain, the government's recent uses of the federal wire fraud statute to provide foreign states with non-reciprocal criminal enforcement of their customs laws against U.S. citizens represent an unprecedented phenomenon in Western legal history. As no prosecutor had ever undertaken to enforce the revenue laws of a foreign sovereign in this way, there are no prior revenue rule cases directly addressing the scenario prior to the *Boots* prosecution. The government has pointed to this absence as

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[25] Indeed, as Present opposing counsel has argued in another context, "It is beyond dispute that the Revenue Rule has been consistently applied in the international community. In fact, *no court has failed to apply the rule when asked to give effect to the revenue laws of a foreign sovereign.*" *RJR* Amicus Brief at 7 (emphasis added).

proof that the revenue rule does not bar such prosecutions. Br. in Opp. at 6-7. In fact, it proves just the opposite. The historic lack of such prosecutions demonstrates that the applicability of the revenue rule in the criminal context has, like the rule against suing in foreign courts to collect tax debts, "been regarded as self-evident to all concerned." *Taylor*, 1955 A.C. at 514. Indeed, courts have not hesitated to apply the revenue rule to unprecedented actions that clearly fell within the rule's scope.[26]

The First Circuit's opinion in *Boots* was the first to address the question whether use of the federal wire fraud statute to prosecute evasion of foreign revenue laws falls within the scope of the revenue rule. The defendants had been convicted of wire fraud in furtherance of a scheme to transport tobacco into Canada without payment of Canadian excise taxes. *See* 80 F.3d at 582-83. The court's analysis was straightforward, identifying three key reasons to reverse the conviction under the revenue rule. First, upholding the conviction "would amount functionally to penal enforcement of Canadian customs and tax laws," as the essential element of a "scheme to defraud" depended entirely on "whether a violation of Canadian tax laws was intended[.]" *Id. at* 587. This, in turn, would require the court "to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them," thus "effectively passing on the validity and operation of the revenue laws of a foreign country[.]" *Id.* Finally, upholding the conviction would "have the

[26] *See Gilbertson*, 597 F.2d at 1164 n.7 (noting that best explanation for lack of precedent was that "the 'well established rule' that it cannot be done has deterred all attempts") (citation omitted); *Taylor*, 1955 A.C. at 514-15 (Lord Somervell) ("[States] have not in the past thought it appropriate to seek to use legal process abroad against debtor taxpayers. They assumed, rightly, that the courts would object to being so used."); *Drukker*, [1928] 1 Ch. at 882 (foreign sovereign could not sue to enforce claim for revenue) ("[T]he absence of authority . . . may merely indicate that it is so well recognized that it has never been put to the test.").

effect of licensing prosecutions against persons who use the wires to engage in smuggling schemes against foreign governments irrespective of whether a particular government had the reciprocal arrangement called for in [the federal anti-smuggling statute]." *Id.* at 588.[27]

The Fourth Circuit's rejection of *Boots* in this case is based on the view that prosecution under the wire fraud statute "does nothing civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant," and therefore does not implicate the revenue rule. Pet. App. at 13a. In other words, the Fourth Circuit held that forcing a defendant to compensate Canada for unpaid taxes would enforce Canada's revenue claim, but criminally punishing that defendant for failure to pay them—and basing the length of the sentence on the size of the alleged tax loss—does not. The distinction makes little sense; ultimately, the way we "enforce" *any* law is by threatening to punish those who fail to obey it. The non-enforcement rule is designed to avoid implementation of a foreign sovereign's public policy, not merely enrichment of its treasury.[28]

[27] As discussed *infra* at 45-46, the federal anti-smuggling statute, 18 U.S.C. § 546, provides for criminal enforcement of the customs laws of a foreign nation only when that nation has a reciprocal law.

[28] *See Gulf, Colorado & Santa Fe Ry. Co.*, 220 U.S. at 300 (refusing to exercise jurisdiction where state sought injunction to enforce its laws prohibiting the conveyance of alcohol) ("Although the State does not ask for [monetary judgment], she yet seeks the aid of this court to enforce a statute one of whose controlling objects is to impose punishment in order to effectuate a public policy touching a particular subject relating to the public welfare."); *A.G. of New Zealand v. Ortiz*, [1984] 1 A.C. 1, 20 (H.L. 1983) ("We do not sit to collect taxes for another country *or to inflict punishments for it.*") (emphasis added); *Schulze*, [1801] 9 Scots Law Times at 4-5 (foreign government could not collect costs of enforcing customs laws) ("No proceeding . . . which has for its object the enforcement by the state, whether directly or indirectly, of punishment

That issues of foreign law were not "merely incidental" to this prosecution, as the Fourth Circuit supposed, Pet. App. 14a, is apparent from Petitioners' sentences, which were based in dominant part on the revenue loss Petitioners allegedly intended to inflict on Canada and Ontario. *See* Pet. App. 36a (Gregory, J., dissenting) ("Because the bulk of the defendants' sentences were related, not to the American crime of wire fraud, but to the Canadian crime of tax evasion, I conclude that this case was primarily about enforcing Canadian law.").[29] Notwithstanding this sentencing element, the government sought to avoid a determination that it was enforcing Canadian revenue law by waiving any request for restitution in this case, on the ground that it was not appropriate in light of the revenue rule. J.A. 106. Given that 18 U.S.C. § 3663A(c)(1)(A)(ii) mandates payment of restitution to the victim of a wire fraud scheme however, the prosecutor had no authority to pick and choose which elements of Canadian law to incorporate into Petitioners' sentences. Had the prosecutor proceeded as required by law, it would have been clear to all concerned that a prosecution under the federal wire fraud statute for failure to pay taxes to a foreign sovereign is also an effort to vindicate, enforce, and assist in collecting on that foreign sovereign's claim to revenue.

Moreover, a wire fraud prosecution in which the alleged loss is tax revenue to a foreign sovereign inevitably places the courts of this country in the position of construing and

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imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country.") (citation omitted).

[29] The court's use of intended tax loss as a factor to enhance Petitioners' sentences violated their Sixth Amendment rights as explained in *Blakely v. Washington*, _S.Ct._, 2004 WL 1402697 at *4 (June 24, 2004) ("the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."). *See* n.2 *supra*. Petitioners sentences must be vacated in light of *Blakely*.

passing on the validity of those laws. *See Boots*, 80 F.3d at 587; *see also Cleveland*, 531 U.S. at 20-27 (analyzing Louisiana law to determine whether state held a property interest in an unissued video poker license), discussed *infra* at 35-40; *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000) (reversing conviction where government failed to meet its burden to prove existence of Canadian law).

Incidentally or not, prosecutions of wire fraud based on alleged schemes to evade foreign taxes necessarily enforce the policies underlying the relevant tax laws and advance the interests, both monetary and non-monetary, of the foreign sovereign, which may be at odds with the policy objectives of this nation, as determined by Congress. This is particularly clear in the example of customs laws, whose purpose is often to discourage importation and consumption of particular items (such as alcohol) as much as to collect revenue. *See infra* 43-44. Such laws may impose not only monetary obligations, but also duties of disclosure and limits on the movement of goods, while prescribing criminal penalties for non-compliance. Indeed, this dual nature of customs law does much to illustrate why penal and revenue laws are so often mentioned in the same breath in formulations of the non-enforcement rule. When faced with either type of enactment by a foreign sovereign, courts refuse to take any action—whether to assist in collection efforts or to inflict punishments—that would advance the policy interests of other lands, unless they are expressly directed to do so by domestic statute or treaty.

II. THE WIRE FRAUD STATUTE DOES NOT ENCOMPASS PROSECUTION FOR FAILURE TO PAY TAXES TO A FOREIGN SOVEREIGN.

The prosecution in this case was based upon an interpretation of the wire fraud statute unbounded by text or history. The reach of the statute, however, is constrained

both by its text and by the background law that guides the interpretation of that text.

The wire fraud statute does not criminalize the entire panoply of wrongful conduct in which a wire transmission may be used. Rather, it penalizes "scheme[s] or artifice[s] *to defraud*," and does so only when the object is to deprive the victim of "*money or property*." 18 U.S.C. § 1343 (emphases added). These terms are not infinitely malleable. Rather, they are defined with reference to the common law of fraud, and traditional notions of property.[30] Moreover, because of the role played by the mail and wire fraud statutes in defining the additional federal offenses of racketeering and money laundering, and because of the rule of lenity, any ambiguity regarding their scope should be resolved against their application. *See Cleveland*, 531 U.S. at 24-25.

The wire fraud statute, like its predecessor mail fraud statute, was enacted against a common law background, and must be read "with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993).[31] Here, the relevant

[30] *See Neder*, 527 U.S. at 20-25 (holding that the statutory phrase "scheme or artifice to defraud" applies only to deception satisfying the common-law fraud requirement of materiality); *see also Cleveland*, 531 U.S. at 26-27 (holding that unissued government license did not fall within the meaning of the statutory phrase "money or property"); *McNally v. United States*, 483 U.S. 350, 357-57 (1987) (holding that the right to "honest services" did not fall within the meaning of the statutory phrase "money or property" and rejecting argument that schemes or artifices "to defraud" and "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" should be construed independently; rather both types of schemes are limited to those "aimed at causing deprivation of money or property.").

[31] *See also Neder*, 527 U.S. at 21-22 ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (citations and

common law background includes the revenue rule,[32] which traditionally excludes a foreign sovereign's interest in collecting tax revenue from the sphere of interests that the sovereign can claim as "property" and recover through a claim alleging "fraud." Neither the text nor the legislative history of the wire fraud statute provides any ground for reading it to abrogate this rule and to authorize prosecution of conduct that has never been recognized as actionable fraud at common law.[33]

In contrast, in both ratified treaties and statutory enactments, the Legislative Branch has "clearly expressed [its] intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *RJR*, 268 F.3d at 119. Such assistance has, in every instance, been conditioned on a requirement of reciprocal treatment from the foreign government whose tax laws are to be enforced. *See infra* at 44-50. Canada provides no such reciprocal treatment, and this prosecution runs directly counter to Congress's stated policies in this area. The wire fraud statute therefore does not authorize the prosecution at issue in this case.

internal quotation marks omitted); *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word[.]"); *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense[.]").

[32] *See* Joseph Story, Commentaries on the Conflict of Laws at 338-40 (8th ed. 1883) (describing as "firmly established in the actual practice of modern nations" the "settled principle that no nation is bound to protect or to regard the revenue laws of another country[.]"); *supra* at 9-27.

[33] *Cf. RJR*, 268 F.3d at 128 n. 32 ("[T]he fundamental question in this case is whether Congress intended to abrogate [the revenue] rule in enacting RICO.").

A. Congress Did Not Overturn The Revenue Rule By Enacting The General Language Of The Wire Fraud Statute.

Section 1343 by its terms addresses schemes to "defraud" or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises[.]" This language does not mention taxes. Nor does it address the conduct alleged in this case, which involved, not "money or property," but an uncollected and unassessed foreign tax. Petitioners allegedly schemed, not to obtain money or property held by the Canadian government, but to prevent the Canadian government from exercising its regulatory authority to obtain money or property in which it had no preexisting interest *from them*.[34] Such a scenario ill fits the straightforward language of the statute, which appears on its face to be aimed at something very different.

The legislative history of the mail and wire fraud statutes corroborates the conclusion that Congress understood a "scheme" to "defraud" someone of "money or property" to consist of deceptive practices whereby the victim is induced to deliver up control of items that the victim holds as property, not schemes to avoid compliance with government regulations. The original mail fraud statute, upon which the wire fraud statute was based,[35] aimed at punishing "the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of de-

[34] Indeed, the Fourth Circuit acknowledged that what Petitioners obtained by failing to announce their importation of liquor was the ability to proceed into Canada without further inspection by Canadian customs officials, Pet. App. 18a, not money or property.

[35] *See* Act of June 8, 1872, ch. 335, § 301, 17 Stat. 293, 323. This Court has held that to the extent that the mail and wire fraud statutes have the same language, the "same analysis" applies to determining the propriety of prosecutions brought under them. *See Carpenter v. United States*, 484 U.S. 19, 25 & n.6 (1987).

ceiving and fleecing the innocent people in the country." Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). The intent was to prosecute frauds that injure private parties as property holders.[36] Although the statute has been amended from time to time, none of its amendments alter the conclusion that to be punishable under the wire fraud statute, a scheme must aim at obtaining something that the victim of the fraud holds as money or property.[37] *See Cleveland*, 531 U.S. at 26-27; *McNally*, 483 U.S. at 358-60. Moreover, we have found no record in the legislative history of the mail fraud statute of Congress discussing the use of this provision to punish schemes aimed at evasion of either tax obligations in general or foreign customs laws in particular.

The legislative history of the wire fraud statute is equally silent on the topic of tax evasion. The sparse history indicates simply that the wire fraud statute was designed as "a parallel [to the] provision now in the law for fraud by mail." S. Rep.

[36] These schemes included, for example, promises to sell counterfeit money and were all aimed at obtaining from a victim, something in which the victim held a proprietary interest. *See* Cong. Globe, 41st Cong., 3d Sess. at 35.

[37] In *McNally*, this Court held that the right to honest services did not fall within the definition of "money or property." See 483 U.S. at 360. Following *McNally*, Congress enacted 18 U.S.C. § 1346, which extended the statute's reach to schemes "to deprive another of the intangible right of honest services." Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (1988). This amendment left the holding of *McNally* in place, subject to this limited exception, so that except with respect to the right to honest services, the wire fraud statute remains limited to interference with traditional property rights. *See Cleveland*, 531 U.S at 19-20. Congress also considered adopting a more far-reaching change in law that would have provided that the terms "fraud" and "defraud," used anywhere in the United States Code, included defrauding another "of intangible rights of any kind whatsoever in any manner or for any purpose whatsoever . . ." 133 Cong. Rec. 33253 (Nov. 30, 1987) (statement of Senator Specter). This bill, which would have added a new section 7 to Title 1, Chapter 1 of the United States Code, was never enacted into law.

No. 44, 82nd Cong., 1st Sess. 19 (1951). In 1956, Congress amended the statute to criminalize uses of foreign as well as interstate wires to further a scheme to defraud a victim of money or property.[38] Before doing so, Congress obtained the view of the Department of State that "the Department perceives no objection to the enactment of the proposed amendment on the basis of international relations." Letter from Robert C. Hill to Hon. Emanuel Celler dated June 24, 1956, reprinted in 1956 U.S.C.C.A.N. at 3093. In contrast, we have found no discussion in the legislative history of the impact on foreign relations of applying these statutes to prosecute as wire fraud the failure to pay taxes to a foreign sovereign.

In short, there is no indication that Congress ever understood uncollected taxes of any type—much less those potentially owed to foreign sovereigns but as to which the foreign sovereign itself has made no adjudication—to fall within the meaning of the phrase "money or property." Nor is there any indication that Congress intended to adopt a meaning of the term "defraud" that would depart from the common law revenue rule prohibition on enforcing a tax obligation through a fraud claim in the courts of another nation. Moreover, given that Congress sought the advice of the State Department prior even to bringing the use of foreign wires within the scope of the statute, it seems rather unlikely that it would have authorized federal authorities to enforce the revenue and customs laws of every nation on Earth without so much as a single recorded discussion of this unprecedented departure from international practice.

[38] This was a narrow amendment added in order to overrule a case holding that a fraudulent telephone transmission from Mexico to California could not give rise to a wire fraud prosecution. S. Rep. No. 44, 82nd Cong., 1st Sess. 19 (1951). *See also* H.R. Rep. No. 2385, 84th Cong., 2d Sess. 1 (1956), reprinted in 1956 U.S.C.C.A.N. 3091, 3092.

B. Schemes To Avoid Foreign Tax Laws Do Not Fall Within The Common Law Scope Of Fraud And Are Therefore Outside Of The Plain Meaning Of The Wire Fraud Statute.

In *Neder*, this Court concluded that "actionable 'fraud' had a well-settled meaning at common law," and that Congress had incorporated this well-settled meaning into the mail and wire fraud statutes through its use of the term "defraud." 527 U.S. at 22-23. This Court accordingly held that a wire fraud prosecution could arise only from a misrepresentation or omission of a "material" fact, because an immaterial misrepresentation or omission was not actionable at common law. *Id.* at 23-25. The Court explained: "[U]nder the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes. On the contrary, we must *presume* that Congress intended to incorporate materiality 'unless the statute otherwise dictates.'" *Id.* at 23 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)); *see also*, *Field v. Mans*, 516 U.S. 59, 69-75 (1995) (holding that the term "fraud" used in Section 523(a)(2)(A) of the Bankruptcy Code incorporated common law doctrine requiring justifiable reliance).

By the same token, we must presume that Congress incorporated other well-settled limits on the common law of fraud, such as the unavailability of this claim to foreign sovereigns as a means of recovering unpaid tax revenues.[39] Had it so

[39] Similarly, modern cases have consistently barred foreign governments from bringing in the courts of this country fraud-based RICO actions based on the alleged failure to pay foreign taxes, thus demonstrating the continued applicability of the revenue rule to bar fraud claims. *See RJR*, 268 F.3d at 134; *Philip Morris Cos.*, 341 F.3d at 1261. Since the date of Petitioners' conviction, Congress has contemplated codifying the RICO ruling of *RJR*. Although Congress has not done so to date, courts

desired. Congress could have adopted a definition of fraud that expressly abrogated the revenue rule, just as it abrogated the common law requirements of reliance and damages by allowing prosecution based on mere "schemes to defraud," *see Neder*, 527 U.S. at 24-25, and just as it later expanded the scope of actionable schemes to those aimed at "the right to honest services," *see Cleveland*, 531 U.S. at 19-20. In this instance however, Congress has not done so. By failing to give sufficient weight to the limits imposed by the common law revenue rule, the Fourth Circuit expanded the scope of the wire fraud statute and altered a basic premise of our international relations, all without any direction from Congress.

The Fourth Circuit also deviated from common law principles, and relied instead on assumptions regarding Canadian law, in its treatment of whether the government had provided evidence of a material misrepresentation. The government introduced no evidence to show that Petitioners or anyone involved in the alleged scheme made any affirmative misrepresentation to the Canadian government. As the Fourth Circuit acknowledged, the only basis for finding that the materiality requirement had been fulfilled was Petitioners' "purposeful routine failure to declare their possession of imported liquor." Pet. App. 18a.[40] At common law however,

continue to rule that use of U.S. mails and wires to violate foreign tax laws cannot serve as a predicate offense for civil RICO. *See European Community v. RJR Nabisco, Inc.*, 355 F.3d 123, 135-36 (2d Cir. 2004), *petition for cert. filed*, No. 03-1427 (Apr. 12, 2004). Thus, there was no history at common law, and there is no history today, of treating tax evasion as civil fraud outside the nation in which it was committed.

[40] Officer Jonah testified that there is a primary inspection line where "the officer asks you where you live, what is your citizenship, and goods that you have entering Canada." J.A. 67. There was no evidence establishing that the customs officers ask everyone who enters the same questions, or that they asked Petitioners in particular any questions at all. Nor was any evidence presented to establish that any questions asked at the border make specific reference to alcohol, or that Canadian law imposes a duty to answer.

the mere failure to disclose information is not actionable in the absence of some special relationship or legal obligation giving rise to a duty to disclose. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 106 at 737-39 (5th ed. 1984). In this case, any such duty could arise only from Canadian law. If Canadian law does impose such a duty, however, the government gave no notice to Petitioners that it intended to submit proof on this point. *See* Fed. R. Crim. Pro. 26.1. Perhaps to advance its position that this case does not require detailed review of foreign revenue laws, the government elected not to submit any. The fact that the government relied upon presumed Canadian disclosure requirements to satisfy the materiality element, rather than proving an affirmative misrepresentation, demonstrates just how pervasively Petitioners' convictions constitute an effort to enforce foreign penal and revenue law.

C. Uncollected Foreign Taxes Do Not Constitute "Money Or Property" In The Hands Of The Government Under Section 1343.

The text of the wire fraud statute addresses neither taxes nor tax claims, whether adjudicated or unadjudicated, foreign or domestic. It penalizes only schemes to defraud someone of "money or property." This Court has consistently held that the meaning of this phrase is circumscribed by "traditional concepts of property," *Cleveland*, 531 U.S. at 24, and has rejected interpretations that would lead to an expansion of federal criminal jurisdiction in the absence of a clear statement by Congress.[41] Applying the same methods of

[41] *See Cleveland*, 531 U.S. at 20-26 (unissued video poker license was not "property" within the hands of the state of Louisiana and therefore not within scope of mail fraud statute); *Carpenter*, 484 U.S. at 25 (reaffirming that the mail and wire fraud statutes protect only property and holding that confidential business information, which has a long history of being treated as property, is within scope of these statutes); *McNally*, 483 U.S. at 359-60 (right to honest services did not fall within the term "property" as used in the wire fraud statute).

analysis this Court has used in the past leads to the clear conclusion that the unassessed, unadjudicated revenue claims of a foreign sovereign cannot be assumed to constitute "money or property" for purposes of Section 1343. To determine whether a "property" interest existed would require a detailed and intrusive analysis of the foreign laws in question, one that would conflict with the revenue rule. Moreover, there are strong reasons to believe that *no* foreign revenue claim can properly be regarded as an assertion of property rights.

1. *Under* Cleveland, *a court cannot determine a foreign sovereign's interest to constitute "property" without passing on the validity and operation of foreign law in a manner traditionally forbidden by the revenue rule.*

In *Cleveland*, this Court demonstrated that a detailed review of applicable law is required before a governmental interest can be treated as "property" under the mail fraud statute, 18 U.S.C. § 1341. Asked to determine whether Louisiana's interest in an unissued video poker license was a property interest, this Court engaged in a thorough analysis of the state law in question. First, the Court examined the statutory provisions regarding these licenses, concluding that "whatever interests Louisiana might be said to have in its video poker licenses, the State's "core concern is *regulatory*." *Id.* at 20-21 (emphasis in original). The Court reached this determination in part because of the involvement of the State Police in regulating licensing and the fact that the statute defines criminal penalties for unauthorized use of the devices that required a license. *Id.* at 21-23. Although the Court recognized that the State "has a substantial economic stake in the video poker industry," it found this interest inadequate to create a property right in unissued licenses. *Id.* at 22. Nor did the fact that the defendants in that case had "frustrated the State's right to control the issuance, renewal, and revocation

of video poker licenses" affect a "property" interest. Rather, this Court held that "these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate." *Id.* at 23.

The Court went on to address the government's contention that the State's licensing scheme was similar to a patent right because it encompassed the right to exclude, concluding that "[a]lthough it is true that both involve the right to exclude, we think the congruence ends there." *Id.* at 23. Significant to the Court's analysis was the fact that the State of Louisiana could not transfer its licensing authority and did not act as a market participant in the industry. "Louisiana does not conduct gaming operations itself, it does not hold video poker licenses to reserve that prerogative, and it does not 'sell' video poker licenses in the ordinary commercial sense. Furthermore, while a patent holder may sell her patent, . . . the State may not sell its licensing authority." *Id.* at 23.[42]

The Court also rejected the government's argument that the State, in authorizing video poker licensees, was acting like a franchisor selecting its franchisees. The court noted that a franchisor's rights derive from its ownership interest in an underlying asset and its participation in the market.

> Louisiana's authority to select video poker licensees rests on no similar asset. It rests instead upon the State's sovereign right to exclude applicants deemed unsuitable to run video poker operations. A right to exclude in that governing capacity is not one appropriately labeled

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[42] According to the Court in *Cleveland*, "[i]nstead of a patent holder's interest in an unlicensed patent, the better analogy is to the Federal Government's interest in an unissued patent. That interest, like the State's interest in licensing video poker operations, surely implicates the Government's role as sovereign, not as property holder. *See* U.S. Const., art. I, § 8, cl. 8." 531 U.S. at 23-24. Similarly, the Canadian interest at stake in this case flows not from the Canadian government's ownership of property but from its sovereign power to regulate the entry of persons and goods into a country which it governs but does not own.

> 'property.' . . . . In short, the State did not decide to venture into the video poker business; it decided typically to permit, regulate, *and tax* private operators of the games.

Id. at 24 (emphasis added).

Finally, the Court rejected the government's reading of the mail fraud statute because it would result in a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24. The Court noted that the State of Louisiana itself provides for criminal penalties for making false statements in license applications and observed that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Id.* at 24-25 (citations and internal quotation marks omitted). Congress has not amended the mail fraud or the wire fraud statutes since *Cleveland* to alter the factors that determine whether a government interest qualifies as "property." Accordingly, they remain (1) whether the interest is regulatory (as demonstrated in part by the existence of criminal penalties attaching under the law of the relevant jurisdiction for conduct that interferes with the government's authority);[43] or proprietary; (2) whether the interest is transferable; and (3) whether the interest otherwise comports with the "traditional concepts of property."

Making the inquiry called for by *Cleveland* with respect to foreign revenue law is a highly intrusive endeavor requiring a detailed inquiry into complex substantive and procedural issues under foreign tax systems. As to transferability, for example, under any particular legal regime, a tax claim may be (1) entirely unassignable, (2) assignable only once it has been reduced to a judgment, or (3) assignable at some other

[43] *Cf.* J.A. at 51 (noting that Petitioners were criminally indicted in Canada for their violations of Canadian customs law).

time, such as after assessment (or its equivalent)[44] or after exhaustion of all appeals. Whether and at what stage a tax claim is assignable may depend in turn on whether the law of the relevant jurisdiction regards taxation as an inherently governmental function, which itself may be a complex and intrusive judicial inquiry. In addition, courts adjudicating such claims will necessarily have to consider such issues as whether the tax at issue is valid under foreign law, as well as whether it violates U.S. public policy, including constitutional principles, trade policies, and other significant public policy considerations.[45] Courts will also be required to determine

[44] In the United States, assessment is the formal recordation by the government of a taxpayer's liability, and reflects the government's determination of the amount owed. 26 U.S.C. § 6203. The government may either accept the taxpayer's report of the amount due, or independently verify the amount by auditing the taxpayer. 26 U.S.C. §§ 6201(a)(1), 7602(1). "[A]n assessment has 'the force of a judgment'" and generally enables the government to require immediate payment. *See* Michael I. Saltzman, IRS Practice and Procedure ¶ 10.01[1] (rev. 2d ed. 2004) (quoting *Bull v. United States*, 295 U.S. 247, 259 (1935)); *see also Hibbs v. Winn*, 124 S.Ct. 2276, 2285-86 & n.3 (2004) (reviewing function of assessment in tax law). Under a U.S.-Canada Tax Treaty, for example, the United States will provide no assistance to Canada in collecting taxes unless the amount of the tax has been "finally determined" in Canada. Revised Protocol Amending the Convention With Respect to Taxes on Income and on Capital of September 26, 1980, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 ("Revised Protocol"). There is no evidence in this case that Canada performed any equivalent of an assessment or otherwise made a final determination relating to Petitioners' tax liability.

[45] Trade disputes that are or have been before the World Trade Organization include numerous disputes between the United States and Canada and three separate disputes between the United States and other countries relating to liquor taxes of these countries. *See* U.S. Trade Rep., Snapshot of WTO Cases Involving the United States, available at http://www.ustr.gov/enforcement/snapshot.html (updated Mar. 9, 2004); U.S. Trade Rep., Dispute Settlement Update, available at http://www.ustr.gov/enforcement/update.html (updated Mar. 9, 2004). One recent trade dispute concerned a discriminatory Turkish tax on box office receipts for motion pictures, a tax that may implicate free speech, as well as free trade

whether the tax in question is aimed not just at raising money, but also at regulating behavior, as many taxes, including those on alcohol and tobacco, often are. *See infra*, at 43-44. A healthy skepticism about the propriety of U.S. courts making such determinations prompted Judge Hand's concurrence in *Moore*. *See supra* at 14.

This Court's decision in *Cleveland* shows that Judge Hand's concern in *Moore* applies with full force to criminal prosecutions brought under the wire fraud statute. That the Executive Branch is bringing such a prosecution in no way relieves the court of the burden of passing on the "validity and operation" of foreign revenue law. *See Boots*, 80 F.3d at 588 ("whether conduct is criminal cannot be a determination left solely to prosecutorial discretion."). For U.S. courts to make such determinations necessarily affects the foreign relations of the United States. Absent the clearest statement by Congress requiring the courts of this country to venture into such terrain, this Court should long hesitate before concluding that the wire fraud statute so dramatically altered the role of the United States courts in foreign relations.[46]

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concerns. *See* U.S. Trade Rep., Section 301 Table of Cases as of Aug. 9, 2002 ("2002 Table of Cases"), available at www.ustr.gov/html/act301.htm#301_80; *Leathers v. Medlock*, 499 U.S. 439 (1991). The United States has sparred with Ontario directly regarding the legality of its beer taxes. *See* 2002 Table of Cases.

[46] *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359, 2366 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 144, 147 (1957) (declining to apply act of Congress to facts affecting foreign relations where "[i]t appears not to have even occurred to those sponsoring the bill" that the Act would cover such circumstances, and noting that "[f]or us to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed."); *cf. Cleveland*, 531 U.S. at 24-25 (declining to interpret wire fraud statue in such a way that would alter the "federal-state balance in the prosecution of crimes") (citations and internal quotation marks omitted).

2. *There is no basis for concluding that the governmental interest at issue in this case would quality as "property" under* Cleveland.

The government made no effort in this case to establish that Canada's or Ontario's interest in receiving tax revenue had the qualities of "property." The only evidence introduced at trial regarding any such interest was the testimony of Officer Jonah, who was not offered as an expert on Canadian law. Officer Jonah stated that Canada and Ontario impose sales and excise taxes on imported alcohol, and she purported to calculate the amount of Canadian taxes per case. J.A. 65-66. This testimony did not address the nature of Canada's interest. Nor did the district court instruct the jury that it had to determine whether the unpaid taxes qualified as "money or property," saying rather that the requisite intent would exist if Petitioners intended to cause these governments "some loss." J.A. 89. Ultimately, neither the district court nor the Fourth Circuit engaged in the analysis of Canadian law required by *Cleveland*, relying instead on an unsupported assumption that the Canadian interests at issue constitute "property."[47] This assumption, however, was not only unsupported, but erroneous. Unadjudicated tax claims of a foreign sovereign do not fall within the "traditional concept of property." 531 U.S. at 24.

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[47] The Fourth Circuit asserted that "a government has a property right in tax revenues when they accrue." Pet. App. 16a (citing *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566 (1950)). The Fourth Circuit, however failed to cite any Canadian authority on point, but rather cited a case dealing with the U.S. Internal Revenue Code, which is not typically regarded as an authoritative source for issues of Canadian customs law. Moreover, the *Manning* case addresses issues relating to the accrual of interest, rather than whether the government's interest is proprietary and transferable.

Taxes in general, and import taxes on "sin" products such as alcohol and tobacco in particular, are generally regulatory in nature. The origin of any governmental claim of right to tax revenues is generally sovereign fiat, not labor or capital investment. *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988) (describing the "assessment and computation of taxes" as "a primeval governmental activity."). In the United States, for example, the U.S. Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises." U.S. Const., art. I, § 8. "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const., art I., § 9, cl. 5. "All Bills for raising Revenue shall originate in the House of Representatives. . . ." U.S. Const., art. I, § 7. The Sixteenth Amendment provides Congress with the "power to lay and collect taxes on incomes, from whatever source derived." U.S. Const., amend. XVI. At its founding, the United States, in its sovereign power, even constitutionalized the ultimate sin tax, providing that slavery could not be abolished until 1808, but that "a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. Const., art. I, § 9, cl. 1.

In light of the inherently sovereign basis of our own tax laws, no court should presume that simply because a foreign tax is capable of generating revenue for a governmental entity, that government's interest in tax collection qualifies as "money or property" for purposes of the wire fraud statute. *See Cleveland*, 531 U.S. at 22 (fact that grant of license would result in future income did not render it property in the hands of the State). Today, the United States classifies tax assessment and collection as "inherently governmental functions." *See* Federal Activities Inventory Reform Act of 1998 ("FAIR Act") § 5(2)(B)(i)-(v), Pub. L. No. 105-270, 112 Stat. 2382. Indeed, the Executive's own policy is to treat, for purposes of the wire fraud statute, the government's interest in collecting tax revenue as regulatory, not

proprietary, and not to use the mail or wire fraud statutes to prosecute cases in which the alleged loss is tax revenue.[48]

Treaties relating to tax issues also recognize the power to tax as a "sovereign right." *See, e.g.*, WHO Framework Convention on Tobacco Control, art. 6 (signed by U.S. May 10, 2004, not yet in force or ratified by Senate) ("FCTC"), as do cases and commentaries regarding the revenue rule, *see supra* at nn.6-7, 18. Indeed, the government's concession that under the revenue rule, "the courts of one sovereign will not enforce the tax judgments or unadjudicated tax claims of another sovereign," Br. in Opp. at 7, is tantamount to an admission that tax obligations owed to a foreign sovereign are not the same thing as "money or property." If they were, the courts of this country would perforce permit a foreign sovereign to recover the sums owed to it through an action in the courts of this country. *See, e.g., The Sapphire*, 78 U.S. 164, 167 (1870) ("A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts.").

Taxes on products such as alcohol and tobacco are also presumptively "regulatory" for the additional reason that such taxes are generally aimed at regulating demand for such products. This Court has recognized such taxes as "mixed-motive taxes" because they serve "both to deter a disfavored activity and to raise money." *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 780 (1994). International instruments, such as the FCTC, recognize the

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[48] *See* U.S. Attorney Manual, Title 6, Tax Resource Manual, 18 Tax Division Directive No. 99, Charging of Tax Crimes as Mail, Wire or Bank Fraud or as RICO or Money Laundering Predicates (Mar. 30, 1993) (stating that mail, wire, and bank fraud prosecutions are not appropriate when the alleged loss is to the government in its revenue-raising role); U.S. Attorney Manual § 6-4.210 (distinguishing prosecutions that relate to fraudulent tax shelters because such violations cause pecuniary harm to private parties).

deterrent effect of taxation on consumption of such products. *Id.*, art. 6, § 1 ("price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.").[49] The regulatory function of taxes of this type causes such taxes to fall well outside of the types of interests that have been traditionally recognized as property.

III. NUMEROUS OTHER ACTS OF THE LEGISLATIVE BRANCH DEMONSTRATE THAT THE WIRE FRAUD STATUTE DOES NOT APPLY TO SCHEMES AIMED AT FOREIGN TAX EVASION.

The lack of a clear statement by Congress authorizing wire fraud prosecutions for schemes aimed at foreign tax evasion is hardly surprising. The Legislative Branch's clearly expressed policy is *not* to authorize the type of prosecution

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[49] Canada itself has stated that its tobacco tax policy is aimed at deterrence. *See RJR*, 268 F.3d at 113 (citing Canada's Complaint) ("Tobacco duty and tax increases, and the resulting higher tobacco prices, held the promise of deterring young people from becoming addicted to a harmful drug [and] of encouraging established smokers to quit."). Many States similarly promote temperance, health, safety, and morals through alcohol regulation, including alcohol taxation. *See, e.g.*, Ala. Code §§ 28-3-2, 7A (1975); Colo. Rev. Stat. §§ 12-47-102, 12-47-503 (West Supp. 2004); Fla. Stat. §§ 562.01, 562.32, 562.408 (West Supp. 2004); 235 Ill. Comp. Stat. 5/1-2, 8-1 (2004); Ind. Code § 7.1-1-1-1, tit. 7.1, art. 4 (West Supp. 2004); Iowa Code §§ 123.1, 123.37, 123.136, 123.183 (West Supp. 2003); Md. Ann. Code, art. 2B, § 1-101, § 5-102 (West Supp. 2004); Mont. Code Ann. §§ 16-1-101, 16-1-401-411 (West Supp. 2004); Neb. Rev. Stat. §§ 53-101.01, 53-101.05, 53-160 (2003); N.J. Rev. Stat. §§ 33:1-3.1, 54:41-47 (West Supp. 2004); N.Y. Alco. Bev. Cont. Law §§ 2, 125 (McKinney 2004); Okla. Stat. tit. 37, §§ 503, 553 (West Supp. 2004); Or. Rev. Stat. §§ 471.030, 473.030, 473.035 (2003); 47 Pa. Cons. Stat. §§ 1-104, 795 (West 2004); Tex. Alco. Bev. Code §§ 1.03, 201.03 (Vernon 2004); Vt. Stat. Ann. tit. 7 §§ 1, 421, 422 (2003); Wash. Rev. Code §§ 66.08.010, 66.24.210, 66.24.290 (West Supp. 2004); W. Va. Code §§ 60-1-1, 60-3A-21, 60-8-4 (West Supp. 2004).

that the Executive is pursuing in this case. Rather, the Legislative Branch's policies include (1) authorizing enforcement of foreign tax laws only upon receiving a commitment of reciprocity; (2) declining to extend reciprocal agreements, even where they exist, to provide for the enforcement of foreign tax laws against U.S. citizens; and (3) protecting U.S. courts from the need to apply foreign tax laws in the absence of guidance from the relevant country on how it would apply its own law to the case at hand.

The Executive Branch is not the repository of the entire foreign relations power of the United States. Rather, the U.S. Constitution grants to Congress the power to regulate commerce with foreign nations and provides that the Treaty power is shared between the Executive and the Senate, with the Senate having the power to advise and consent. U.S. Const., art. I, § 8; art. II, § 2, cl. 2. In taking care that the laws of the United States are "faithfully executed," U.S. Const., art. II, § 3, the Executive Branch is not free to disregard the will of the Congress and the Senate expressed in statute and treaty. Nor is the Executive free to take from the Judiciary the power "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Acts of Congress: Congress has enacted a statute expressly addressing smuggling into foreign countries, the precise conduct alleged in this case. *See* 18 U.S.C. § 546. In so doing, Congress imposed a significant limitation. The provision does not apply unless the country into which goods are smuggled itself has a reciprocal law criminalizing smuggling into the United States. *Id.* Canada has no such reciprocal law. *See United States v. Miller*, 26 F. Supp. 2d 415, 424-26 (N.D.N.Y. 1998) (dismissing § 546 counts on grounds that Canadian law does not provide reciprocity). Charging a defendant with wire fraud for bringing goods into a country that lacks a reciprocal law on point is therefore directly contrary to Congress's will as expressed in a more specific statute. It is "familiar law" that "a specific statute controls

over a general one without regard to priority of enactment." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (citations omitted).[50]

Treaties ratified by the U.S. Senate: In light of the common law rule that nations do not, absent express agreement, assist one another with tax enforcement efforts, the United States has negotiated several bilateral and multi-lateral international agreements governing the extent of tax assistance that this nation is willing to provide to other nations on reciprocal terms.[51] No such agreement of which we are aware provides for criminal punishment in one nation based on alleged violations of another nation's tax laws. Rather, such agreements typically provide for information exchange and sometimes, in exceptional cases, for limited collection assistance. *See RJR*, 268 U.S. at 115-22.[52] The agreements

[50] *Cf.* U.S. Attorney Manual, § 6-4.210 ("charging a [U.S.] tax offense as a mail fraud charge could be viewed as circumventing Congressional intent" in light of the fact that Congress has defined specific offenses relating to tax violations).

[51] *See, e.g.*, Dennis D. Curtin, *Exchange of Information under the United States Income Tax Treaties*, 12 Brooklyn J. Int'l L. 35, 35 (1986) ("To circumvent the application of [the revenue rule], many countries have entered into bilateral income tax treaties."); Alan R. Johnson, *Systems for Tax Enforcement Treaties: The Choice Between Administrative Assessments and Court Judgments*, 10 Harv. Int'l L. J. 263, 263 (1969) (noting that nations have adopted international agreements relating to tax enforcement to surmount the "obstacle" of the revenue rule and that even by 1969, well after Congress enacted the wire fraud statute, "the United States ha[d] taken only tentative steps" in entering agreements providing for international tax assistance).

[52] Similarly, the treaty between Canada and the United States on legal assistance in criminal matters does not provide for prosecution by one country of criminal conduct occurring in the other. *See* Treaty on Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., Treaty Doc. No. 100-14. Rather, the treaty principally addresses investigatory matters, such as the taking of testimony and the execution of requests for searches and seizures. *See id.* arts. X-XVI. U.S. citizens who have committed criminal violations of any Canadian tax law can be extradited to stand trial in Canada. *See* Treaty on Extradition Between the United States and Canada, art. 2(2)(ii), T.I.A.S. 8237; 27 U.S.T. 983; 1971 U.S.T. Lexis 226 (entered into force Mar. 22, 1976) (providing, in apparent recognition of the revenue rule, that "[a]n offense is extraditable notwithstanding . . . that it relates to taxation or revenue . . ."). Revised Protocol, art. 15 (adding art. XXVI A,

are generally sensitive to the difficulties that our courts would face in interpreting foreign tax laws and for that reason commitments of collection assistance generally do not extend to unadjudicated tax claims. *Id.* at 116-17 & 121 & n.19 (noting that providing enforcement assistance even as to finally determined tax claims goes beyond the norm). Our own income tax code, income tax regulations, and other taxing statutes, both state and federal, are exceedingly complex and subject to extensive interpretation. A foreign government's would be no less so. *See* Abrams, *supra* at 7.

The Second Circuit's decision in *RJR* provides a detailed analysis of the history and content of U.S. tax agreements, including the tax treaty between the United States and Canada, concluding that

> the usual absence in our negotiated tax conventions of any provision for the extraterritorial enforcement of a sovereign's tax judgments or claims cannot be . . . accidental, but instead must reflect the considered policy of the political branches of our government. Thus, the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws.

268 F.3d at 119.

This country's tax treaty with Canada is no exception to that rule. The collection provisions of this treaty apply to "all categories of taxes collected by or on behalf of the Government of a Contracting State," including customs and excise taxes. Revised Protocol, art. 15 (adding art. XXVI A,

¶ 9 to treaty); *see also*, *RJR*, 268 F.3d at 120 & n.17.[53] The Contracting States will not give collection assistance unless the other nation certifies that a revenue claim has been "finally determined," which is defined to mean the point at which the "applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted." Revised Protocol, art. 15 (adding art. XXVI A, ¶ 2 to treaty).

In addition, the Revised Protocol states that "[n]o assistance shall be provided" with regard to Canadian revenue claims against persons—like the petitioners in this case—who are U.S. citizens at the time that the tax liability is incurred. *Id.*, (adding art. XXVI A, ¶ 8 to treaty). Finally, in the Revised Protocol, the United States and Canada committed that they would agree "to ensure comparable levels of assistance to each Contracting State." *Id.* (adding art. XXVI A, ¶ 11 to treaty). As the Second Circuit stated in *RJR*, "[i]n other words, both governments have expressed a policy preference for reciprocity in the level of enforcement of each other's tax judgments and claims." 268 F.3d at 121-22 & n.20 (citing 18 U.S.C. § 546 (the anti-smuggling statute) and

[53] Agreements providing this level of assistance are the exception, not the rule. *RJR*, 268 F.3d at 116-18. The United States Model Income Tax Convention of Sept. 20, 1996, released by the U.S. Department of Treasury, for example, contains no general provision agreeing to assist in the collection of foreign taxes or allowing the enforcement of foreign tax judgments or claims. *See RJR*, 268 F.3d at 118. Indeed, when the United States ratified the Convention on Mutual Administrative Assistance In Tax Matters, among the Member States of the Organization for Economic Cooperation and Development ("OECD"), Mar. 18, 1985, Treaty Doc. No. 100-14, it did so subject to a reservation that the United States "will not provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for any tax." Staff of Joint Comm. on Taxation, 104th Cong., Explanation of Proposed Protocol to the Income Tax Treaty Between the United States and Canada (Comm. Print May 23, 1995), at 42.

Boots, 80 F.3d at 588). The Second Circuit's further comment regarding reciprocity is equally apt to this case:

> Declining to apply the revenue rule in this case would arguably undermine the considered policy judgments of our political branches. Moreover, it would potentially allow Canada to obtain assistance it has not negotiated for . . . .

RJR, 268 F.3d at 122. As was the case in *RJR*, allowing the prosecution in this case would grant Canada greater enforcement assistance than our government would likely receive in return. *Id.*[54] The Revised Protocol thus counsels strongly against interpreting the wire fraud statute to authorize prosecution of U.S. citizens regarding unadjudicated foreign tax claims.[55]

[54] The reciprocity requirement also remains in force between the States, which are not required by the holding of *M.E. White Co.* to enforce tax claims not reduced to final judgment in the courts of the claimant state. *See* 296 U.S. at 275. By 1978 forty-five states had enacted laws allowing their courts to enforce tax claims only on behalf of those States that extended reciprocal rights. *See* H.R. Rep. No. 95-1366, 95th Cong., 2d Sess. (1978) (listing States). Observing this, Congress enacted the same rule for the District of Columbia. *See* District of Columbia Reciprocal Tax Collection Act, 92 Stat. 751. In addition, thirty states (as well as the District of Columbia and the Virgin Islands) have adopted the Uniform Foreign Money-Judgments Recognition Act, which codifies the revenue rule by defining the term "foreign judgment" to exclude "judgment[s] for taxes." *See* Unif. Foreign Money-Judgments Recognition Act, §§ 1-4, adopted by, e.g., Cal. Civ. Proc. § 1713.1 *et seq.*; D.C. Code § 15-381 *et seq.*; Md. Code Ann., Cts. & Jud. Proc. § 10-701 *et seq.*; N.Y. C.P.L.R. 5301 *et seq.*; Va. Code Ann. § 8.01-465.7 *et seq.*

[55] The Second Circuit panel in *RJR* could not overturn the prior precedent of that Court in *Trapilo*, 130 F.3d 547, which had upheld, over a revenue rule objection, a prosecution for money laundering based on failure to pay foreign taxes. The portion of the *RJR* opinion in which the majority seeks to justify treating civil claims and criminal claims differently, however, is entirely unconvincing, 268 F.3d at 122-24, as it fails to address at all the role of the Legislative Branch in foreign affairs or to demonstrate that Congress abrogated the revenue rule in enacting the wire

The collective force of these treaties and statutes demonstrates that the lack of a clear statement applying the wire fraud statue to foreign revenue offenses is no accident. It is the product of deliberative judgment of both Legislative bodies to retain the revenue rule and to deviate from it only upon obtaining reciprocity. Canada has not seen fit to penalize smuggling into the United States or to punish as wire fraud tax violations against the United States that employ Canadian telephones or other wire transmissions. The prosecution in this case diminishes any incentive Canada may have had to do so. Although there is no doubt that the Executive has power in the field of foreign affairs, the Executive may not treat as irrelevant Congress's and the Senate's clearly expressed view that the bargaining position of the United States should not be so compromised.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge the Court to reverse the judgment of the Fourth Circuit and to order Petitioners' convictions and sentences to be vacated.

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fraud statute. *cf. id.* at 139 (Calabresi, J., dissenting) ("there is no basis in the revenue rule itself for treating criminal and civil cases differently").

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